IN THE

Supreme Court of the United States

October Term, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR PETITIONER

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INDEX

Table of Cases Cited

Table of Statutes Cited

Table of Other Authorities Cited

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Opinions Below

The opinion of the Court of Appeals (R. 779-801) is reported at 371 F. 2d 747, that of the Federal Maritime Commission (R. 666-728) at 9 F.M.C. 77.

Jurisdiction

The judgment of the Court of Appeals (R. 802) was entered on December 22, 1966. The petition for a writ of certiorari was filed March 20, 1967 and granted June 12, 1967 (R. 803). The jurisdiction of this Court is invoked under 28 U.S. C., sections 1254(1) and 2350(a) (Supp. II).

Statutes Involved

The pertinent provisions of the Shipping Act of 1916, as amended, 46 U.S.C., sections 801 *et seq.*, and of 5 U.S.C., sections 701 *et seq.*, relating to judicial review of agency action, are set forth in the Appendix, *infra*, pp. 1a-7a.*

Questions Presented

1. Whether section 15 of the Shipping Act requires filing with the Federal Maritime Commission of an agreement by which about one hundred twenty regulated enterprises, dominated by the large shipping lines, are exacting from cargo passing through Pacific coast ports five million dollars annually by means of unequal assessments imposing a disproportionate burden upon petitioner's automobiles transported predominantly by chartered vessels.

2. Whether charging automobiles for certain benefits relating to stevedoring and terminal handling ten times as much, and raising their discharge costs ten times as much, as those of other cargo receiving equal or greater benefits, violates section 16, which prohibits common carriers and other regulated persons from subjecting anyone to "undue or unreasonable prejudice or disadvantage" or section 17 of the Act which demands the enforcement of "just and reasonable regulations and practices."

3. Whether, in any event, the decision below should be reversed because the court, to sustain the agency's

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* For the convenience of the Court there is also set forth in the appendix certain statutory material discussed in the brief: the anti-pooling and related provisions of the Interstate Commerce Act (49 U.S.C., sections 1 *et seq.*), as they read at the time the Shipping Act was enacted, and in 1962, when *Kennedy* v. *Long Island R.R. Co.*, 211 F. Supp. 478 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir. 1963), *cert. denied*, 375 U.S. 830 (1963), was decided, as well as section 412 of the Federal Aviation Act (49 U.S.C., section 1382).

action, resolved for itself factual and legal issues which the Commission, deeming them outside the case, had never reached or considered.

Statement of the Case

At issue in this proceeding is the applicability of various provisions of the Shipping Act of 1916, as amended, ("Act") to a private levy imposed by agreement among the maritime enterprises serving the Pacific coast upon the privilege of discharging or loading cargo. This impost falls most heavily upon petitioner's cargo.

The Mechanization and Modernization Fund

The levy giving rise to this case is the creation of intervenor Pacific Maritime Association ("PMA"), to which about one hundred and twenty companies belong (R. 179, Exs. 46-48, R. 538-587). This is an association composed of the principal common carriers by water, stevedoring contractors and terminal operators serving the West coast ports (Ex. 3, R. 382-384, 616, 667). It was organized for the purpose of negotiating and administering collective bargaining agreements (R. 179).

Among the members of PMA are Marine Terminals Corporation and Maritime Terminals Corporation (of Los Angeles) ("MTC"), respondents in the Commission proceeding (R. 614-615, 667). Marine Terminals Corporation is also before this Court as an intervenor.* These companies are in the business of furnishing stevedoring and terminal services at San Francisco and Long Beach, California (R. 614-615). Ninety percent of their business is done for common carriers (R. 615).

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* Leave to intervene in the Court of Appeals was not sought by Marine Terminals Corporation (of Los Angeles).

Petitioner, Volkswagenwerk Aktiengesellschaft ("VW"), the manufacturer of Volkswagen automobiles, is not a member of PMA, nor is it eligible to be. It is, however, the largest dry cargo shipper on contract carriers to the West coast (R. 614, 165, 150-151), importing by far the greatest number of automobiles passing through Pacific coast ports (R. 136, 150). VW's cars arriving at San Francisco and Long Beach, California, by chartered vessel, and also some coming by common carrier, are discharged by MTC (R. 138-139). At other ports, similar services are rendered by other PMA members in connection with Volkswagen vehicles (*cf.* R. 169-170 with Exs. 46-48, R. 538-587). About 40,000 Volkswagen vehicles enter annually through the Pacific coast ports (R. 612).

This proceeding has its genesis in a financial liability assumed by PMA in 1960-1961 as the price for more efficient operations on the waterfront (R. 668-669, 618-620, Ex. 1A, R. 243-261, Ex. 1B, R. 262-278, Ex. 1C, R. 279-309). After several years of negotiations the International Longshoremen's and Warehousemen's Union ("Union" or "ILWU"), the collective bargaining representative of the Pacific coast longshoremen and marine clerks, agreed to permit the "utilization of labor-saving devices" and the elimination of "restrictive work practices" in cargo handling in return for the creation of a "Mechanization and Modernization Fund" of twenty-nine million dollars (Ex. 1C, pp. 2-3, R. 280, 618-620, 668-669). This fund ("Mech Fund" or "Fund") is to be used to cushion the effects of higher productivity upon the Union's members (617-619, 668-669).

These arrangements between PMA and the Union supply the background for this case, but are not in issue here. Petitioner has repeatedly expressed the view that they represent a most praiseworthy achievement.

It is the inequitable way in which PMA is collecting the money for the Fund that gives rise to the present

controversy. Upon the insistence of PMA, the Union has no voice in how this is done. The decision as to how this sum shall be raised is entirely PMA's (R. 619-620, 668, Ex. 1C, pp. 7-8, R. 283-285, 205-211).

In October 1960, when the Union and PMA reached agreement on the size of the Fund, subject to ratification by their respective memberships, PMA already had in hand one and a half million dollars of the total required (R. 668, 618-619, 193-198). As evidence of its good faith, it had collected this sum while negotiations were proceeding. PMA undertook to accumulate the balance, twenty-seven and a half million dollars, at the rate of five million dollars a year for five and a half years (R. 618-619, 668, Ex. 1B, p. 6, R. 270, Ex. 1C, p. 7, R. 283-284).

The Cooperative Working Arrangement for Raising $5,000,000 Annually

A committee appointed by PMA to advise it regarding how the five million dollars a year was to be raised recommended what it described as "admittedly * * * a rough-and-ready way to divide the cost": payment to PMA of a fixed dollar-and-cents amount on every ton of cargo "manifested for loading or discharging at Pacific Coast ports" (Ex. 5A, pp. 4-5, R. 470-471, 623, 668-669). The committee explained that it was recommending "the present tonnage formula used for the computation of a portion of the PMA dues" (*ibid.*).* It proposed that the rate on bulk cargo be only one-fifth that on general cargo (*ibid.*).

The committee decided against allocating the cost of the Fund by the method which it recognized would be "pre-

* PMA's by-laws provide for three types of membership dues denominated cargo dues, shipping dues and payroll dues (Ex. 3, R. 404-405). Cargo dues were based, at the time, on a combination of the tonnage loaded or discharged at Pacific coast ports and man hours of work, in roughly a 40-60 ratio (Ex. 5B, R. 478). What the majority of the committee recommended was use of the tonnage formula without any man hour factor; a minority wanted to copy exactly the dues ratio and base the Fund sixty percent on man hours and only forty percent on tonnage (*id.* at R. 475).

cise in placing the burden of the Fund on those benefiting from it" (Ex. 5A, p. 2, R. 467). Such a formula would have required "a contribution system based on specific measurement of improvements in longshore productivity of each operator over a base year" (Ex. 5A, pp. 1-2, R. 467). The committee also considered and rejected using man hours as a measure (Ex. 5A, pp. 2-4, R. 468-469). Fear of a Union take-over of the system of assessment played a large part in the committee's deliberations and was an important factor in the decision not to use the alternatives considered (Ex. 5A, pp. 2, 7, R. 467, 472).

The committee recognized that inequities might arise from its "rough-and-ready" measure and recommended annual review "to prevent the continuation of any such inequities that may develop" (Ex. 5A, p. 9, R. 474). PMA's Board of Directors, on January 6, 1961, disapproved the favored treatment the committee recommended for bulk cargo and proposed assessing all tonnage equally (Ex. 2P, p. 2, R. 379-380, 623). However, on January 10, 1961, PMA's membership voted to put the formula recommended by the committee into effect without this change (Ex. 2O, R. 372-377, Ex. 6, R. 479-480, 623-624, 669). At the same time the membership ratified the collective bargaining agreement calling for the creation of the Mech Fund (Ex. 2O, p. 4, R. 377).

PMA's Board of Directors met on January 16, 1961 to translate the formula for raising the Fund approved by the membership into a specific dollar-and-cents amount (Ex. 2N, R. 369-372). Apparently this was done by dividing the amount needed for 1961, five million dollars, by the tonnage which was estimated would be discharged and loaded during the year, making appropriate allowance for the fact that bulk cargo would pay only one-fifth as much as general cargo. The rates computed in this fashion came to 27½ cents per ton for general cargo and 5½ cents for bulk cargo (Ex. 2N, R. 369-372, Ex. 35, R. 521-523, 624).

Disproportionate Burden Imposed on Automobiles

Total wages paid by PMA members for stevedoring and terminal labor in 1962 were slightly in excess of one hundred million dollars. The five million dollar levy for the Fund represented, therefore, about five percent of direct labor costs (R. 169). The Fund assessment raised the average cost of discharge for general cargo about 2.2 percent (Ex. 7, R. 482).

The effect upon direct labor costs and overall discharge costs for petitioner's vehicles would be roughly in line with other general cargo if the PMA assessment were computed upon weight tonnage (Ex. 7, R. 482, 168-169). However, if measurement tons are used, the PMA tax * jumps from $.25 per car to about $2.35 (R. 626). This is because on the average a Volkswagen vehicle has a measurement tonnage approximately ten times its weight tonnage (R.166-167, 626).** A levy of $2.35 per car raises the pre-existing discharge costs about 25 percent, as compared to 2.2 percent for

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* The Court of Appeals described the use of the word "tax" as "forensic rather than analytical" (R. 798). However, it is not petitioner, but PMA which first dubbed the assessment a "tonnage tax" (R. 209-210). This is how PMA's President repeatedly referred to it in his testimony (*ibid.*).

** Two different types of vehicles are shipped by petitioner to the United States Pacific coast. The "egg-shaped" Volkswagen passenger models, which consists of the sedan, the sunroof sedan, the convertible and the Karmann-Ghia, has an average weight of 1,643 pounds per unit or about 8/10 of a weight ton. These cars, however, have a measurement of 7.8 cubic tons. The "box-shaped" Volkswagen models, referred to generally as the "transporter line," which includes the station wagon ("Microbus") and trucks, have an average weight of 2,193 pounds equivalent to about 1.1 weight tons. They measure on the average 456 cubic feet, corresponding to 11.4 measurement tons (R. 166). Based upon the approximate ratio between passenger cars and transporters shipped to the United States Pacific coast, an average Volkswagen vehicle can be said to have a weight of about 0.9 tons and a measurement of 8.7 tons (R. 167).

other general cargo, and increases labor costs for this fringe benefit about 56 percent in contrast with the five percent experienced by all other cargo (R. 135, 149, 168-169, 175-176, 670).

In short, the selection of measurement tons as the basis for the tax results in burdening Volkswagen automobiles about ten times as much as general cargo.* The disproportion is even greater as to bulk cargo which pays one-fifth the rate of general cargo, and greatest as to the commodities subsequently favored by PMA, like logs and lumber.

Initially, uncertainty prevailed regarding whether automobiles would pay on weight or measurement (Ex. 32, R. 519-520). The PMA tax was predicated upon how cargo is manifested, and in the manifesting of automobiles neither weight nor measurement is uniformly employed (R. 669-670, 629, 165-166, 176-177). On chartered ships, automobiles are manifested on a unit basis, but weight and sometimes measurement are shown (R. 165-166, 629, 669-670). On common carriers, both appear (R. 175, 629-670). Tariffs, on the other hand, are on a unit basis and this is the way petitioner pays for its stevedoring and terminal services (Ex. 7, R. 483-484, 139).

Payments to PMA for membership due in connection with shipments of Volkswagen vehicles reflected the diver-

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* Neither MTC nor PMA offered any evidence to question VW's proof that PMA's tax fell ten times as heavily on Volkswagen automobiles as on any other cargo. Although the ten to one ratio formed the heart of petitioner's case and was established by uncontroverted evidence, the Examiner and the Commission failed to make a specifically requested finding on this point (R. 605). Exception was taken to this omission (R. 659-660). Only in the Court of Appeals was this central fact recognized, even if somewhat grudgingly, when the court conceded that "the record made by petitioner is strong—though not as strong as petitioner puts it" (R. 800).

sity in manifesting practices and were paid on all three bases: by unit, by weight and by measurement tons (Ex. 26, R. 511, 84-85). For one company automobiles were reported as "one (1) unit and/or one (1) ton" (Ex. 12, R. 494). MTC predicated their dues payments on measurement tonnage (R. 621-622, 670, 677).

As all the stevedoring contractors discharging Volkswagen vehicles recognized, assessments on a measurement tonnage basis would encounter strong resistance from petitioner (R. 152-153, 240-242). Like bulk cargo and scrap metal, automobiles became the subject of intensive discussion within PMA (R. 241). But whereas remedial action was taken in the case of both bulk cargo and scrap metal (p. 11, *supra*), automobiles were made the subject of a peculiarly harsh rule.

To make certain that automobiles made maximum contributions to the Fund regardless of manifesting practices, PMA's Vice President on February 3, 1961 sent the membership a letter requiring both membership dues * and Mech Fund assessments to be paid on measurement tons (Ex. 36, R. 524-525, 625-626). The letter cited as authority an earlier 1958 communication (never produced by PMA) purportedly taking the same position regarding membership dues. The February 3, 1961 letter was sent because investigation by PMA's Vice President into "Volkswagen shipload shipments" (R. 84) disclosed that PMA's membership dues were being reported on a weight basis (R. 84-87).

Later that month a new committee appointed by PMA to review questions arising in connection with the collection

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* Corrected reports regarding PMA's membership dues were demanded but when petitioner sought at the hearing to determine what PMA's records showed as to whether they had ever been submitted, the inquiry was blocked on the ground that to search the files would be too burdensome (R. 86).

of the Fund (R. 90-91) met to take up, among other things, petitioner's protest against the unfair way in which its costs were being raised (R. 628-629, Ex. 10, R. 487-488). The Committee not only refused all relief but confirmed that in the case of automobiles, uniquely, the manifest was not to be decisive (R. 109-112, 629, 669, 677). Automobiles were to be taxed on a measurement ton basis, regardless how manifested (R. 628-629, 69). Automobiles were thus made the subject of a special rule, since as to all other cargo the manifesting practice of the carriers remained decisive (R. 670, 102-103). Moreover, among the alternatives available, weight, measurement or units, the special rule prescribed the most burdensome solution.

The Unsuccessful Protests by VW and Others

VW promptly protested the "overwhelming discrimination [against automobiles] which is implicit in an attempted levy at a level 10 to 15 times greater than assessed on other general cargo" (Ex. 7, p. 3, R. 481-485). A letter was sent PMA on January 17, 1961 pointing out that Volkswagen vehicles were often freighted, and therefore manifested, for the purposes of liner shipments on a unit basis; that measurement was irrelevant for stevedoring and terminal handling as evidenced by the identical rate paid for the 7.8 cubic ton sedan and the 11.4 cubic ton "Micro-bus"; that automobiles were freighted and manifested in the intercoastal trade on weight basis only; that wharfage on automobiles was according to weight rather than measurement; and that no substantial savings could be expected in the handling of automobiles (*id.*, pp. 2-3, R. 483-484).

Petitioner was not alone in its objection to the use of measurement tons for vehicles. The Army also questioned this ruling (Ex. 10, R. 489, Ex. 22, R. 509, 628 n.18, 633). A carrier, the Hanseatic Vaasa Line, MTC's largest

account after petitioner, carrying automobiles for discharge on the Pacific coast, likewise complained to MTC (R. 238-239).

MTC corroborated the injustice being done petitioner's cargo. In November 1961, at a meeting held by PMA with VW and its stevedore contractors, MTC stated that the "present assessed rate on automobiles is not based on practical conditions and has no comparison to other commodity assessments" (Ex. 25, R. 510). VW again pointed out all the reasons making unfair use of measurement tonnage for the Mech Fund assessment (Ex. 26, R. 511-514).

None of petitioner's many protests, however, resulted in any change in PMA's decision that automobiles were to pay ten times as much proportionately as other general cargo (Ex. 31, R. 517-518, Ex. 32, R. 519-521, 629-630, 670).

Adjustments Made by PMA

Although PMA justified its treatment of petitioner as based on fear of an "assessment rate structure similar to a tariff" (Ex. 10, R. 488), it had no hesitation in tailoring and adjusting its "rough-and-ready" tax in the self-interest of its membership.

Overruling its Board of Directors, PMA's membership, in adopting the assessment plan, put the rate on bulk cargo at one-fifth that of general cargo (R. 623). The Board had wanted all cargo to pay the same rate (*ibid.*). The reduced rate was thought to be justified by the comparatively small amount of labor involved in the discharge of bulk cargo and the correspondingly limited opportunity for future labor savings (R. 77, 114-115). For similar reasons, PMA's Board of Directors immediately thereafter made the one-fifth bulk cargo rate applicable to scrap metal which so far had been considered as general cargo and so reported for dues purposes (R. 78, Ex. 2N, R. 370-371, Ex. 35, R. 522).

Subsequently, but on quite different grounds, radical changes were made in the tax on coastwise shipments which must compete with land transportation. As a first step, the rate for such shipments was cut in half (Ex. 10, R. 487-492, Ex. 22, pp. 16-17, R. 366-367). This was done because coastwise carriage is "a very marginal business economically" (Ex. 10, p. 2, R. 490). Next, logs and lumber moving in this trade were singled out for even more favorable treatment. By two resolutions of the Board of Directors, assessments on these commodities were further reduced retroactively to 2½ cents per ton (Ex. 2F, pp. 4-5, R. 354-355, Ex. 2D, p. 4, R. 348-349, 631). An internal PMA memorandum explains that the original assessments "would [have] put the coastwise lumber industry out of business" (Ex. 21, p. 1, R. 503).

Consideration was also given some of the Army's objections. Departure from the tonnage shown by the manifest was authorized for empty Army conexes (Ex. 10, R. 488-489, Ex. 2L, R. 366). The Army was also permitted to determine the tax on containerized cargo through use of average, rather than actual, measurement (Ex. 2I, R. 361-362).

An industry-wide change was made in the assessment in December 1961 as a result of concern that nothing was being paid into the Fund for tonnage handled within a terminal but not in or out of a ship (R. 97-98, 630-631). A fifteen cent charge was placed on each man hour worked by ship's clerks (*ibid.*). This reduced the tonnage charge to 24¼ cents for general cargo and to five cents on bulk cargo (Ex. 56, R. 594-595, Ex. 57, R. 777-778).

Thus, PMA's levy is a complex one with different rates for general cargo, coastwise cargo, bulk cargo, lumber and logs, and with special rules for scrap metal, automobiles, Army conexes and containers. It is still continuing under a new collective bargaining agreement adopted in 1966 and providing for enlargement of the Fund.

PMA's Shipping Lines Control Its Actions

PMA acts in the self-interest of the persons who control it* and these are the shipping lines. PMA's by-laws give its carrier membership a majority on its Board of Directors (Ex. 3, pp. 5-9, R. 382-386, 74-75) and the controlling vote at membership meetings (Ex. 3, pp. 11-12, R. 387-388; compare Exs. 39-41, R. 525-538 with Exs. 46-48, R. 538-587.)** In addition, carriers furnished all the members of both the PMA committee appointed to consider how the cost of the Mech Fund should be allocated and the commmittee subsequently formed to pass upon any inequities resulting from that method (Compare R. 75-76, 90-91 with Exs. 46 and 47, R. 540-553, 555-570). Despite the fact that this involved a cost relating exclusively to labor employed in stevedoring and terminal operations, neither committee included a single representative of the terminal operators or stevedoring contractors unaffiliated with a steamship line.

True, under PMA's plan its carrier members ultimately foot the bill for the Fund assessment on cargo shipped by them to or from this country (Ex. 55, p. 2, R. 589-591, Ex. 2L, R. 367-368). If tax considerations had not intervened, they would have paid it directly (R. 77, Ex. 35, R. 521-523). PMA requests its carrier members to "advance to their contractors sufficient monies with the remittance advice in or-

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* This was insisted upon by PMA's own counsel before the Commission:

> "PMA members, like members of similar organizations, are not altruistic. It is probable that each member of PMA will exercise its voting power in its self-interest and will seek to persuade other members to its views whether or not they have the same interest." (Brief of PMA to Examiner, p. 11.)

** The Examiner's finding "that there is no substantial evidence in the record to support Volkswagen's contention" that liner interests dominate PMA (R. 649 n.42) is irreconcilable with PMA's own by-laws, which are in evidence, and forms the subject of a specific exception by VW (R. 662-663) on which the Commission made no ruling.

der that the contractors may make payments promptly to the Association" (Ex. 55, p. 2, R. 590). If, for any reason, the stevedore or terminal operator defaults in payment, the member steamship company is liable (Ex. 1C, pp. 15-16, R. 289).

On the other hand, the carrier members of PMA do not carry the burden of the Mech Fund assessments as to cargo loaded or discharged for non-PMA members, *i.e.*, non-PMA carriers and chartered cargo (Ex. 55, p. 2, R. 589-591, Ex. 21, R. 503-504). Over seventy percent of petitioner's cargo is transported by chartered vessel (R. 614) and much of the remainder by non-PMA carriers (Compare R. 164 with Exs. 39-41, R. 525-538, 632). Consequently, the more Volkswagen automobiles pay towards the five million dollars needed annually, the less has to come out of the pockets of PMA's carrier members. As the Chairman of PMA's two funding committees conceded on the witness stand: "Any reduction of anyone's assessment will increase everybody else's for the reason that this is a lump sum that has to be raised" (R. 133).

Thus, when scrap metal was brought under the low bulk cargo rate (*supra*, p. 11), the rate for all other general cargo was increased three-quarters of a cent per ton. In considering whether the change should be made, concern was expressed that other commodities might seek similar consideration and specific reference was made to automobiles (Ex. 2N, p. 2, R. 370).

In February 1962, an internal PMA memorandum (Ex. 28, R. 515), prepared when "the reduction of assessments on automobiles to a lesser amount" was being considered (Ex. 29, R. 516), deals entirely with the impact an adjustment in the assessments on this cargo would have on the over-all rate. This memorandum concludes that cutting the automobile assessment in half (which would have meant that automobiles paid five, rather than ten, times as much proportionately as other general cargo) would have caused an

increase of 2.6 percent for all other cargo (*ibid.*). Not surprisingly, therefore, those in control of PMA disapproved any reduction in the assessment on petitioner's cargo (Ex. 31, R. 517-518).

Efforts by PMA to Collect the Assessments on Volkswagen Automobiles

Prior to adoption of the Mech Fund assessment by PMA, MTC's profit on the discharge and terminal handling of each Volkswagen vehicle was one dollar or less (R. 145). As a matter of practical economics, therefore, the PMA tax which amounted to about $2.35 per vehicle had to be passed on to petitioner. Had the tax been placed on a weight basis, in which event it would have amounted to about twenty-five cents per car, MTC would have been willing to continue working at the old commodity rate, as it advised VW (R. 154). But when measurement tons were made the base, all the contractors discharging Volkswagen vehicles recognized that it would have to be collected from petitioner (R. 626-627).

When MTC called on VW for the money, however, VW refused to pay because it considered the assessment on a measurement basis to be "unjust" (Ex. 9, R. 486-487). MTC was told that the assessment, if included in the rate, would be deducted (Ex. 9, R. 486, 627). MTC promptly advised PMA of these developments and asked for advice on "what stand we can take in demanding payment of this assessment" (Ex. 9, R. 486-487, 634). VW's representatives were told that "we at Marine Terminals Corporation are merely following out the instructions set forth by the Board of Directors of the Pacific Maritime Association and therefore are considered only a collection agency in this matter" (*ibid.*).

Subsequently, PMA's Board of Directors took up "the problem of collecting funds from Volkswagen due the Mech-

anization Fund" (Ex. 2H, p. 4, R. 356-357). MTC requested PMA's Board of Directors for authority "to bring suit against Volkswagen for the monies due" and for "both legal and moral support" in connection therewith (*ibid.*). These requests were granted (R. 634). But further consideration led to tactical changes (Ex. 2F, p. 6, R. 355). When litigation finally started on August 14, 1962, it took the form of a suit by PMA against MTC and the other onshore operators engaged in discharging Volkswagen automobiles for the unpaid assessments (R. 18-27). MTC impleaded VW (R. 28-39), which secured a stay of these judicial proceedings pending determination by the Commission whether the Shipping Act had been violated (R. 671-672).

The Proceedings Below

In January 1963, VW filed a complaint with the Commission, naming MTC as respondents and challenging the legality under the Shipping Act of the underlying agreements among the members of PMA and the acts taken by them in execution of these agreements (R. 12-17). PMA made itself a party to this proceeding by intervening (R. 43-57, 1).

The Examiner and a majority of the Commission found no violation of the Act. Section 15, requiring all cooperative working arrangements to be filed and approved before execution, was inapplicable, the majority ruled, because it applied "only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives" (R. 673-674). The PMA agreement, the Commission ruled, did not meet this test because of the absence of "an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators" (R. 675). Accordingly, as the Examiner had held, the "non-filing of a copy" of its cooperative working arrangement did not violate the Act (R. 656).

Section 16 was held to be unavailable because petitioner had not shown that cargo competitive with its automobiles had been preferred (R. 676). Regarding section 17, the Commission found nothing unreasonable in MTC's "passing on" of the Mech Fund assessments (R. 676-678). Although it acknowledged that automobiles were burdened more heavily than other cargo for no greater benefits, the Commission declared that as long as "substantial benefits" were received it would not declare a charge unlawful. "There is no statutory requirement," the Commission said, "that all users of a facility be assessed equally" (R. 677).

Commissioner Hearn disagreed with the conclusion reached by the Commission as to section 15; he thought PMA's plan came under the majority's reading of that section (R. 722-728). Commissioner Patterson strongly dissented on all points, finding all the sections invoked by petitioner to have been violated (R. 678-722).

In deference to the Commission's "expertise," the Court of Appeals, "albeit with some hesitation," accepted the agency's conclusion that PMA's funding arrangement was not covered by section 15 (R. 792-794). Examining under section 17 not only MTC's passing-on of the assessments but also PMA's actions, as the Commission had failed to do, the court concluded that PMA had acted reasonably in taxing automobiles on a measurement rather than a weight basis (R. 794-801). If section 17 was not violated, section 16 was likewise satisfied (R. 801). Hence the court found it unnecessary to pass on the Commission's reasons for deeming that section unavailable.

In affirming dismissal of petitioner's complaint, the court made it plain that it was not closing its eyes to, but that it considered outside the issues of the case, "petitioner's claim that it is the target of a combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter" (R. 801n.13).

Summary of Argument

Direct labor costs and total discharge costs for automobiles have been raised from ten to one hundred times as much as for other cargo, for the same benefits, through PMA's tonnage tax. Sections 15, 16 and 17 of the Shipping Act were all enacted to curb discriminatory treatment of shippers. Yet, under the decisions below, none of these provisions reaches this obvious discrimination.

I

Section 15 requires filing and approval before execution of any agreement between covered persons involving discrimination, *i.e.*, "giving special privileges or advantages" or "preferential" arrangements, or involving rate-fixing or control of competition, as well as "cooperative working arrangements." PMA's assessments fall squarely into these categories. Lumber, bulk cargo and scrap metal are being favored and automobiles disadvantaged. PMA's assessments control competition and regulate charges for terminal services. The arbitrary allocation of a common cost is a price-fixing device. As the Examiner found, and as no one denies, there is present here a "cooperative working arrangement" among persons subject to the Act. But the Commission puts PMA's program outside section 15 on the ground that legislative history shows the statute applies "only to those agreements involving practices which affect that competition" which otherwise "would exist between the parties when dealing with the shipping or travelling public." To the contrary, the legislative history confirms that Congress intended what the words of the statute say, that all concerted action in the maritime industry, whether or not the parties are competitors or the persons affected are shippers, passengers or carriers, must pass governmental scrutiny. The Commission's view, if accepted, would divide jurisdiction over collective action in the maritime industry between the absolute prohibitions

of the antitrust law and the license, under governmental regulation, of the Shipping Act. Such a division would wreck the legislative scheme, invite administrative chaos and shelter anticompetitive conduct.

The Court of Appeals mistakenly held that its review of the Commission's construction of section 15 was governed by the "substantial evidence" rule. Actually, however, a court reviewing administrative action has both the power and the duty to resolve such questions of a purely legal nature, involving neither fact-finding nor administrative expertise and which judges are best equipped to handle.

II

The Commission recognized that a section 15 agreement meeting the conditions it laid down would be present if PMA's stevedoring and terminal operator members had explicitly agreed to pass-on PMA's assessments to petitioner and their other non-PMA customers. But section 15 embraces more than common-law contracts; it extends as well to "understandings * * * and other arrangements." All concerned participated in and relied on the understanding that "passing-on" of the assessments was an integral part of the scheme. In fact, in the case of Volkswagen automobiles, passing-on was mandated by the size of the PMA tax. Both decisions below applied a wrong legal standard focusing on what the parties said rather than what they did.

III

Resort to section 16 was held to be foreclosed by the Commission because no cargo competitive with automobiles had been preferred. But, as the Commission has recognized both before and since, this "competitive cargo" requirement is inapplicable where arbitrarily different charges are made for similar benefits. This latter and sounder view is supported by judicial decisions construing section 16 and the parallel provision of the Interstate

Commerce Act and should have been applied here. Because of its view on the section 17 issue, the Court of Appeals did not pass on this question.

IV

A.

The Commission applied the wrong rule to the wrong issue. First, it held section 17 to be satisfied if "substantial benefits" were received by Volkswagen automobiles, regardless how disproportionate the return exacted for such benefits. Such an interpretation licenses exactly the discrimination the statute was intended to prevent. Second, the Commission examined in accordance with this erroneous rule only the reasonableness of MTC's attempted pass-on of PMA's assessments, not the assessments themselves or the considerations lying behind the discriminatory treatment of petitioner's cargo, all of which clearly had been challenged by petitioner.

B.

The Court of Appeals agreed that it was the PMA tax itself, not simply the pass-on, which had been attacked. The court adjudicated this issue itself in place of remanding for determination by the Commission. Invading the administrative area, the court sustained PMA's discriminatory treatment of automobiles as justified by history and administrative convenience. Both legally and factually it erred.

C.

Prohibited discrimination under section 17 is to be tested by objective standards. To make one cargo subsidize another breaches section 17. Because petitioner's automobiles are being compelled to pay far more than their proportionate share of a common industry cost, while favored cargo contributes less, section 17 is violated by the PMA tax.

ARGUMENT

I

The interpretation placed on section 15 by the Commission and erroneously deferred to by the court below guts the Shipping Act.

The common carriers, contracting stevedores and terminal operators comprising the membership of PMA are engaged in a cooperative working arrangement under which a disproportionate share of a common cost has been shifted to Volkswagen automobiles. The tax they are levying is as inescapable as any within the power of government.

The words of the Alexander Report * (p. 304) which prompted passage of the Shipping Act, fit like a glove.

> "[S]teamship companies, through private arrangements, have secured for themselves monopolistic powers as effective in many instances as though they were statutory * * *. They exercise their powers as private combinations and are apt to abuse the same unless brought under effective governmental control."

Section 15 of the Shipping Act forbids execution of such a cooperative working arrangement until approved by the Federal Maritime Commission. To put PMA's plan outside section 15, the Commission refuses to accord the statutory language its plain meaning and imposes instead a series of interlocking requirements rendering section 15 impotent to remedy the evils it was enacted to reach.

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* By the "Alexander Report" is meant the "Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade" of the House Committee on Merchant Marine and Fisheries, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914).

A

In enacting the Shipping Act it was the intention of Congress to subject all collective action in the maritime industry to governmental scrutiny.

The reasons for the passage of the Shipping Act are well known. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 487-490; *id.* at 504-513 (dissenting opinion of Mr. Justice Frankfurter) (1958); *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213, 218-219 (1966). Early in this century, at a time when Congress was concerned with anti-competitive combinations generally, the shipping industry was made the subject of a searching inquiry by the House Committee on Merchant Marine and Fisheries under the chairmanship of Congressman Alexander. This investigation turned up evidence of typical monopoly practices. Chief among the victims were carriers competitive with the shipping cartels and shippers who patronized them. Because "in our foreign carrying trade the monopoly obtained by the conference lines has not been subjected to any legal control" (Alexander Report, 304), many abuses were revealed. Exporters and importers filed complaints with the Committee, objecting, among other things, to excessive rates, discrimination among shippers in rates and cargo space and retaliatory action against shippers employing the services of carriers not part of the anti-competitive combination (*id.* at 308, 417). Shippers paid rates which were fixed "arbitrarily, both with reference to the general level and particular commodities" (*id.* at 305).

Because absolute freedom of competition was considered impracticable in ocean shipping, the remedy proposed was governmental regulation. Influencing the Committee was the fact that shippers, in general, concurred in the view that the conference system was mutually advantageous if "honestly and fairly carried out" (*id.* at 308, 418-419). However, the uniform experience had been that "once the

combination of lines is established, it is apt to be used in an arbitrary and unfair way" (*id.* at 308, 418-419). Accordingly, what shippers favored was a "comprehensive system of government supervision, sufficiently broad to embrace the regulation of rates without actually fixing them, the approval of contracts, agreements and arrangements, and the general supervision of all conditions of water transportation which vitally affect the interests of shippers" (*id.* at 308, 418). In the view of the Committee, the "discriminations and arbitrary treatment" accorded shippers by the steamship monopolies could "only be eliminated by the establishment of some legally constituted authority which is empowered to hear complaints and to order the discontinuance of abuses" (*id.* at 308, 419).

The Committee was "not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action" (*id.* at 417). The Shipping Act [39 Stat. 728 (1916)] followed. *Federal Maritime Board* v. *Isbrandtsen Co., supra,* 356 U.S. 481, 490 (1958).

When the bill was under consideration, Representative Alexander opposed an amendment that would have removed portside services from its coverage. 53 Cong. Rec. 8277 (1916). He explained that for an agency to effectually regulate water carriers and prevent "unjust discrimination between shippers" "it must also have supervision of all those incidental facilities connected with the main carriers." 53 Cong. Rec. 8276 (1916).

The Shipping Act is admirably designed to accomplish the legislative purpose. Its first section defines broadly the persons subject to its provisions so as to embrace not only common carriers by water, but suppliers of ancillary services used by the carriers as weapons to penalize and punish shippers employing competitive transportation.

Other sections prohibit specific abuses which the hearings had revealed. *Inter alia,* section 14 bars any carrier by water from discriminating against any shipper because "such shipper has patronized any other carrier * * * or for any other reason." Section 16 forbids discriminatory acts and section 17, unjust and unreasonable practices.

These explicit regulatory sections are complemented by section 15, drawn to ensure that no collective action may be taken in the maritime industry without prior government scrutiny. This provision requires the filing and approval of every agreement (by which is meant as well "understandings, conferences and other arrangements") falling into any one of seven categories, among persons subject to the Act. Included is any agreement "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; * * * or in any manner providing for an exclusive, preferential or cooperative working arrangement." An agreement failing to meet certain requirements is not to be approved. Approved agreements are exempt from the antitrust laws.

During the last decade Congress has repeatedly demonstrated its continued concern with the regulation of collective action in the maritime industry by strengthening the Shipping Act and reorganizing its administration. These steps have been taken in consequence of investigations disclosing that the "recommendations of the Alexander committee, culminating in the historic Shipping Act of 1916, have, through no fault of that committee, utterly failed in attaining its objectives." H.R. Rep. No. 1419, 87th Cong., 2d Sess., 385 (1962); H.R. Rep. No. 498, 87th Cong., 1st Sess., 6-7 (1961); S. Rep. No. 1, 89th Cong., 1st Sess., 22-23 (1965).

During the 87th Congress exhaustive investigations made by the House Committees on the Judiciary and on

Merchant Marine and Fisheries resulted in several amendments of the Shipping Act in the interest of more effective enforcement. 75 Stat. 762 (1961). Significantly, no change was made in the broad coverage of section 15. To afford shippers greater protection than the investigation showed they had been receiving, however, the Commission was directed to disapprove any section 15 agreement if it found "failure or refusal [of the parties thereto] to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints." 75 Stat. 764 (1961). Furthermore, the Commission was directed to disapprove any agreement found to be "contrary to the public interest." 75 Stat. 763 (1961).

But Congress looked mainly to the reorganization of the regulatory agency to make the Shipping Act function as intended. Both Committees laid the blame on "the successive regulatory bodies charged with administering and enforcing" the Act for the failure "to give to international shipping practices that supervision which was anticipated by the authors of the 1916 act." H.R. Rep. No. 498, 87th Cong., 1st Sess., 6 (1961). Of the Commission's predecessors the House Judiciary Committee said:

> "For a period of almost 45 years, lethargy and indifference have characterized its attitude, laxity and inefficiency its procedures, and frustration and ineffectiveness its administration of the regulatory features of the shipping acts." H.R. Rep. No. 1419, 87th Cong., 2d Sess., 359-360 (1962).

To improve the administration of the Act, the Federal Maritime Board was replaced with the present Federal Maritime Commission. Reorganization Plan No. 7, 75 Stat. 840 (1961); H. R. Rep. No. 1419, 87th Cong., 2d Sess., 3, 397 (1962); Note, *Rate Regulation in Ocean Shipping,* 78 Harv. L. Rev. 635, 642 (1965).

But in 1965, when ocean shipping practices once more came under Congressional scrutiny, the conclusion was

again reached that "actual regulation of steamship conferences has never been carried out. * * * Neither the protection of free competition in the market place nor the protection of Government regulation has been provided the public." S. Rep. No. 1, 89th Cong., 1st Sess., 22 (1965).* Once more the responsibility was laid at the door of the administrative agency. What was specifically criticized was how shipper's complaints had been discouraged by the "ineptitude and neglect of the Federal Maritime Commission" (*id.* at 27-28). "The expense and delay of a legal quarrel against both the steamship conference and an indifferent or hostile regulatory agency were simply too much for shippers to assume" (*id.* at 27). In consequence of these new disclosures, changes were made in the personnel of the Commission and in its staff, and new procedures were instituted (*id.* at 28).

Thus the Act's legislative history going back six decades shows a consistent Congressional purpose to bring collective action in the maritime industry under effective governmental control. Congress's most recent recommendation to the Commission is that it "use all of its statutory powers to protect American commerce from discrimination" and maintain "strict surveillance" over steamship operators "to protect the public interest" (*id.* at 5).

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* What the Joint Economic Committee, the author of the report, said was:

> "Broadly speaking, the succession of regulatory agencies that have been charged with administration of the statute, each in its brief turn, have been poorly informed and ill equipped. They have simply not known what was occurring in the industry, and have generally had no grasp of legal or technical principles. They proceeded on particular instances, and established no positive rules of conduct. In the absence of general standards based on national policy, the tendency became irresistible to permit what was on the one hand adroitly advocated by special interest, and on the other hand was not condemned under articulated guidelines."

B

The arrangement among the membership of PMA represents exactly the type of collective action Congress intended to subject to scrutiny in the public interest.

There is present here precisely the type of collective power which the statute was drawn to control, exercised by exactly the persons the statute was intended to cover, to the prejudice of just such a shipper as it was designed to protect.

That the common carriers who dominate PMA are under the Shipping Act is unquestionable. And MTC, like most, if not all, of the balance of PMA's membership, (R. 617), are as squarely covered by the definition of "other person" in section 1 of the Act. This term means anyone other than a common carrier by water "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." MTC are terminal operators engaged in furnishing terminal facilities to common carriers by water (R. 640-643). Their pier and storage facilities are exactly the type referred to in the Act. *California* v. *United States*, 320 U.S. 577 (1944). And in earlier proceedings, as well as in this one (R. 641), MTC have been found to be "other persons subject to this chapter." *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946): *Carloading at Southern California Ports* (*Agreement* No. 7576), 2 U.S.M.C. 784, 786 (1946). *Cf., Investigation of Certain Storage Practices*, 6 F.M.B. 301, 313-315 (1961).

It is doubtful whether any cartel investigated by the Alexander Committee exercised power greater than that enjoyed by PMA. Acting through the medium of that organization, the carriers dominating it can exact tribute from every ton of cargo entering or leaving our shores by way of the Pacific coast. As PMA's President conceded, its as-

sessments carry the potential for "abolishing whole segments of the industry" (R. 212). Just as automobiles are taxed one hundred times as much as coastwise lumber, so can they equally well be made the subject of a levy one thousand times greater.

Petitioner belongs to just the category of persons the Act was enacted to protect: shippers who employ transportation competitive with that provided by the organized carriers. Approximately three-fourths of petitioner's very substantial shipments to the Pacific coast arrive by chartered vessel (R. 614), making petitioner the largest dry-cargo shipper employing such carriage to these ports (*ibid.*).

Finally, the overall result exactly parallels the abuses leading to the Shipping Act. Organized shipping lines are acting together to discriminate against a shipper employing competitive transportation.

Not surprisingly, therefore, the language employed by Congress to bring collective action in the maritime industry under effective governmental supervision covers PMA's plan four-square.

C

PMA's agreements fix transportation rates, give special privileges, regulate competition and provide for a cooperative working arrangement.

No one denies that the plan is a "cooperative working arrangement" among persons subject to the Act. The Examiner so found (R. 639-640) and this finding is questioned neither by the Commission (R. 672-673, 674) nor by the court (R. 786). Since section 15 requires filing for approval any agreement "in any manner providing for an exclusive, preferential *or* cooperative working arrangement" (emphasis added) no further inquiry is necessary.

But PMA's impost is covered by more than this omnibus language. PMA's program also involves "fixing or regu-

lating transportation rates or fares," "giving or receiving * * * special privileges and advantages" and "controlling, regulating, preventing or destroying competition."

Rates for terminal and stevedoring services are fixed and regulated by the establishment of a uniform or artificial cost. No rate can go below the floor thereby created. That PMA's plan regulates rates was recognized by both dissenting commissioners (R. 698, 709-710, 727). As Commissioner Patterson pointed out:

> "The effect of the measurement tonnage measure and assessment was to create a new cost element in addition to pre-existing rates for terminal facilities. Respondents [MTC] had to increase their charges to their customers to recover the new costs and thereby the total transportation cost of moving automobiles was increased. The measurement ton assessment on automobiles became a part of the Respondents' rate structure." (R. 709).

PMA's program also provides for "special privileges and advantages." Bulk and scrap metal pay only one-fifth as much as general cargo. That the coastwide trade, and particularly lumber, is heavily favored is indisputable. Coastwise lumber carries only one-tenth the assessment imposed on general cargo (p. 26, *supra*). Moreover, to the extent that the discharge of automobiles is disproportionately burdened with a cost common to all cargo discharged at the Pacific coast ports, all other cargo is "receiving special rates * * * or other special privileges or advantages." "[A]ny preferred treatment by charges or otherwise of certain classes of cargo results in discrimination against other cargo." *Practices, Etc., of San Francisco Bay Area Terminals,* 2 U.S.M.C. 588, 603-605 (1941), *aff'd, sub nom., California* v. *United States,* 46 F. Supp. 474 (N.D. Cal. 1942), *aff'd,* 320 U.S. 577 (1944).

Finally, PMA's tonnage tax also affects competition. PMA's on-shore members, by committing themselves to pay

PMA approximately $2.35 for every vehicle they handle, have curbed their ability to compete by lowering their prices. Recognition that the assessment inhibited competition is shown by the decision to subsidize the coastwide trade in general, and lumber in particular, by radically reducing the assessment on these commodities. As PMA's internal records disclose, this was done in order to permit water transportation to remain competitive with land carriage (p. 12, *supra*).

Indeed, wages always affect prices. Labor's special standing may immunize such effect from the antitrust laws, if it is a legitimate consequence of a collective bargaining agreement requiring labor to be paid in proportion to use. But wholly different considerations apply if employers, acting in concert by agreement, artificially allocate a common labor cost to specific commodities, discriminating against outsiders and subsidizing their own businesses. To quote Commissioner Patterson again:

> "If a group of competitors agree to share a cost element such as the rental of a pier and terminal area and then allocate the rent after a collectively made decision to named customers or specified types of property, instead of allowing actual use to govern the allocation, they thereby distort the normal forces of the market by their agreement to allocate, which is the equivalent of control" (R. 710).

Creation of an unavoidable artificial cost element is a far more effective price-fixing device, *pro tanto*, than a mere exchange of promises regarding future pricing policies.

This is demonstrated by what occurred here. Before even the first dollar was paid, the terminal operators discharging Volkswagen vehicles took counsel with one another regarding the changes they would have to make in their rates. As the Examiner found:

> "It was the consensus of the group that the company doing the discharging would be unable to absorb the contribution if it was assessed on a measurement basis and it was indicated that the assessment should be passed on in the stevedoring rate to the customer" (R. 626-627).

Costs cannot be increased artifically and by agreement without impact upon customers. Taking jurisdiction of an agreement among common carriers regarding payments to foreign freight forwarders, the Commission itself has observed:

> "There can be no doubt that the agreement to pay commisions abroad had some resulting impact on the landed costs of goods in this country." *Investigation of Practices, Operations, Actions and Agreements, West Coast of Italy,* 1967 A.M.C. 467 (1966).

Similarly, if Pacific coast stevedores paid PMA assessments, they necessarily had to include them in negotiating their charges with their customers. As PMA itself has pointed out:

> "Obviously the costs of the Mechanization Plan, accepted by PMA in exchange for ILWU's acceptance of labor saving cargo-handling operations, were among the many costs included within the mix and ultimately reflected in the commodity rate." *Answer of Intervenor Pacific Maritime Association to Memorandum for the United States,* 7 (May 30, 1967).

To agree regarding some elements entering into the final price is to fix to that extent such price. To inhibit price freedom is anticompetitive. *Cf. United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221-224 (1940).

D

To exclude PMA's agreement from section 15 the Commission has rewritten and eviscerated the statute.

That PMA's assessment program is within the plain meaning of the text of section 15 is admitted by the Commission (R. 673-674). But the Commission does not deem itself obligated to apply the language as written. According to the Commission:

> "[T]he legislative history is clear that the statute was intended by Congress to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives" (R. 674).

For the PMA plan to meet this test it would have to be demonstrated, the Commission says, "that there was an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators" (R. 675). In other words, proof of an express contractual commitment to pass on the assessment would have to be forthcoming.

This elaborate definition cannot be squared with either the language of section 15 or the underlying regulatory scheme. On the contrary, each of its constituent parts flies into the teeth of both.

First, section 15 is not confined to agreements between persons in competition with one another. On the contrary, "every common carrier by water, or other person" is required to file a copy of "every agreement with another such carrier or other person." A freight forwarder does not vie for business with a carrier, yet "agreements or understandings * * * between forwarders and carriers may be discriminatory in such a way as to violate the provisions

of § 15." *United States* v. *American Union Transp., Inc.*, 327 U.S. 437, 447 (1946). Similarly, it could scarcely be maintained that a lessor of terminal facilities as such is in competition with his lessee, but such a lease may nonetheless be subject to section 15. *Agreements Nos. 8225 and 8225-1*, 5 F.M.B. 648 (1959), *aff'd sub nom., Greater Baton Rouge Port Comm'n* v. *United States*, 287 F. 2d 86 (5th Cir. 1961), *cert. denied*, 368 U.S. 985 (1962).

Indeed, even the Commission's defenders are driven to declaring that the agency did not intend to limit "the scope of section 15 only to agreements between parties in direct competition with each other" (Brief for the Federal Maritime Commission in Opposition, 15n.7; Brief for Intervenors in Opposition, 14). But then, what becomes of the elaborate edifice which has as its cornerstone the requirement that the agreement must "affect that competition" which otherwise "would exist between the parties"?

There are difficulties with the Commission's formula even if all the Commission meant is that the agreement must be one affecting competition. Why then, in addition to agreements "controlling, regulating, preventing or destroying competition," did Congress carefully enumerate and define six other categories of covered agreements?

Finally, what leads the Commission to conclude that only shippers or travelers are protected by section 15? Under the Commission's exegesis, to come under section 15 an agreement must have an impact upon "the shipping or traveling public or their representatives" (R. 674). According to the Commission, agreements within section 15 are those relating to the "rates, fares, charges or commissions paid to or by shippers, passengers, forwarders, brokers, agents, etc." (*ibid.*). Conspicuously missing is any reference to charges paid to or by carriers.*

* Most inconsistently, however, the opinion later states the critical issue in this case to be the existence of an additional agreement by PMA's members to pass on the assessments "to the *carriers* and shippers served by the terminal operators" (R. 675) (emphasis added). This suggests that the effect upon carriers, as

But one of the reasons which led to the passage of the Shipping Act was concern for the independent carrier. See *Federal Maritime Board* v. *Isbrandtsen Co., supra,* 356 U.S. 481, 488-493 (1958). This is reflected in the statutory direction to disapprove any agreement found "to be unjustly discriminatory or unfair as between carriers" as well as "shipper, exporters, importers, etc." Indubitably, sections 16 and 17, the specific prohibitory sections complementing section 15, protect carriers as well as shippers or travelers. *E.g., Philippine Merchants S.S. Co., Inc.* v. *Cargill, Inc.,* 9 F.M.C. 155 (1965); *Boston Shipping Ass'n, Inc.* v. *Port of Boston Marine Terminal Ass'n,* F.M.C. Docket No. 66-28, June 28, 1967. Why should section 15, which is central to the regulatory scheme, receive a more restrictive reading? In fact, jurisdiction exercised without question in the past under section 15 over agreements affecting carriers would seem to be in jeopardy. *E.g., Agreement No. 9025: Middle Atlantic Ports Dockage Agreement,* 8 F.M.C. 381 (1965); *Northern Pan-American Line* v. *Moore-McCormack Lines,* 8 F.M.C. 213 (1964).

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well as shippers or travelers is relevant. But the preceding sentence in the opinion explains that what the Commission is looking for is "impact upon outsiders," and, of course, carriers are not "outsiders" to PMA's arrangement. Moreover, the discussion of the evidence which follows appears to be limited to whether this was an agreement to pass-on to petitioner, that is, to a shipper. Certainly, the dissenting opinions are so confined. Nevertheless, PMA says that the Commission found that its "funding arrangements were not designed to pass on to *carriers* and shippers the stevedore's costs of participation in the Plan" (emphasis altered). (Answer of Intervenor Pacific Maritime Association to Memorandum for the United States, 10). Petitioner believes on the contrary that one of the reasons the Commission excluded carriers from its test was because no such finding can possibly be made on this record. Admittedly, however, it is impossible to reconcile the inconsistencies within the Commission's opinion. The Commission's decision should be reversed for this reason, if for no other. A reviewing tribunal should not be "left to spell out, to argue, to choose between conflicting inferences." *United States* v. *Chicago M., St. P. & Pac. R.R.,* 294 U.S. 499, 510-511 (1935); *Atchison, Topeka & Santa Fe R. Co.* v. *United States,* 295 U.S. 193, 201-202 (1935).

Finally, assuming that section 15 could legitimately be restricted to agreements affecting competition for shipping or traveling business, certainly such effects should be sought as much, if not more, in the necessary, inevitable or even intended consequences of an agreement, as in its explicit terms. Why then should an explicit contractual commitment to pass on PMA's assessments be determinative?

As the Commission itself has pointed out, to determine if an agreement lessens competition:

> "[W]e must examine not only the terms of an agreement, but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objectives and results of the agreements. * * * To decide otherwise is merely to reward the clever draftsman at the expense of our regulatory responsibility." *Agreement No. T-4: Terminal Lease Agreement at Long Beach, California,* 8 F.M.C. 521, 529 (1965).

E

None of the authorities cited by the Commission support the elaborate, interrelated requirements it reads into section 15.

Neither the Commission nor its defenders make any attempt to reconcile the drastic surgery performed on section 15 with the legislative history of the Act, with the statutory language, with the regulatory scheme or with past interpretations. No consideration whatever is given to the policy of the Act nor how it will be affected by the administrative gloss now placed on its language. Our criticisms of that construction based on the outrage to the text and the frustration of the legislative intent are left unanswered.

The Commission justifies its narrow, crippling prescriptions on purely technical grounds. It presents them as com-

pelled by legislative history, not as needed or desirable to carry out the broad remedial purposes intended to be served by the Act.

But, in fact, the legislative materials relied on by the Commission in no way support, let alone require, the result reached. They do indeed show that the Shipping Act had its source in Congressional concern over anticompetitive arrangements. But what they make equally clear is that the remedy selected by Congress was to place under supervision all collective action in the maritime industry, not simply such conduct as could be demonstrated to be anticompetitive. In addition to the Alexander Report itself, the Commission rests its interpretation upon the opposition expressed in 1961 by the Assistant Attorney General then in charge of the Antitrust Division to any change in the broad sweep of section 15 (R. 674 n.2).

At the time Congress was considering amending section 15 to give the Commission's predecessor power to "exempt [an] agreement or category of agreements" upon finding that it "does not limit or restrict competition between the parties thereto or between such parties and others." S. Doc. No. 100, 87th Cong., 2d Sess., 27, 73 (1962). The Assistant Attorney General opposed the amendment on the ground "that all agreements described in section 15 can be presumed to limit or restrict competition or they would not have been included in the language of the section"* and the proposal was abandoned. *Id.* at 28.

Fully aware that not all the agreements swept up by the all-embracing language of section 15 would necessarily turn out upon examination to limit or restrict competition, Congress, nevertheless, left the language of section 15 unchanged. It adhered in 1961 to the all-inclusive language

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* *Hearings Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries,* 87th Cong., 1st Sess., 428 (1961).

it had adopted after exhaustive study in 1916. Thus, contrary to what the Commission concludes, the language which Congress "selected as a matter of deliberate choice" exactly reflects the legislative intent. *Carnation Co.* v. *Pacific Westbound Conf., supra,* 383 U.S. 213, 220 (1966).

The other straws relied on by the Commission give it as little support. That it may have excluded from section 15 agreements to pool secretarial workers or to share office space or otherwise refused in the past to apply section 15 literally does not justify either the elaborate requirements now read into section 15 nor the results reached.

Nor can such justification be found in *Kennedy* v. *Long Island R.R. Co.*, 211 F. Supp. 478 (S.D.N.Y. 1962), *aff'd,* 319 F. 2d 366, 372 (2d Cir. 1963), *cert. denied,* 375 U.S. 830 (1963), the final authority cited by the Commission. In that case a labor union attacked a railroad strike insurance plan on the ground, among others, that it violated the Sherman Act and a similar but more limited prohibition of the Interstate Commerce Act, section 5(1) [49 U.S.C., section 5(1)]. That section embraces "any contract, agreement or combination * * * for the pooling or division of traffic, or of service, or of gross or net earnings or of any portion thereof." The District Court held that section 5(1) was intended to reach "a well-defined type of anti-competitive arrangement" and had "no application to payments made for strike insurance." 211 F. Supp. at 489.

Section 15 should be similarly limited, the Commission says, in deference to the principle that "settled construction in respect of the earlier act [the Interstate Commerce Act] must be applied to the later one [the Shipping Act]" (R. 674). But this principle, as the Commission itself recognizes, is subject to the very important qualification that there be nothing "peculiar in the questions under consideration" or "dissimilarity in the terms of the act relating thereto" requiring a different conclusion (R. 674-675).

When the Shipping Act was enacted, section 15 and section 5(1) were wholly dissimilar in language and purpose. Whereas section 15 was broadly drawn to bring under governmental supervision anti-competitive conduct otherwise permitted and deliberately excluded from the reach of the antitrust laws, section 5(1), as originally enacted [Interstate Commerce Act, 24 Stat. 379, 380 (1887)], anticipated the broader but similar provisions of the Sherman Act by flatly prohibiting a narrowly-defined type of anti-competitive conduct.* *Cf. United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897). What it proscribed was the "pooling of freights" or the division of earnings. In 1920, after passage of the Shipping Act, section 5(1) was amended to permit such pooling agreements if approved and authorized by the Interstate Commerce Commission. Section 407, Transportation Act of 1920, 41 Stat. 456, 480 (1920). But neither at that time, nor later when the Interstate Commerce Commission was given power to exempt certain additional types of agreements among railroads from the antitrust laws [62 Stat. 472 (1948), 49 U.S.C., section 5b],** did the Interstate Commerce Commission ever enjoy jurisdiction comparable to that given the Federal Maritime Commission over all agreements "controlling, regulating, preventing or destroying competition" and over "cooperative working arrangements."

Significantly, in *Kennedy,* the Second Circuit found it necessary to distinguish the different results reached under language similar to that contained in the Shipping Act, *i.e.,* that in section 412 of the Federal Aviation Act (49 U.S.C., section 1382). Like the Shipping Act on which it is pat-

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* For the convenience of the Court, section 5(1), as it appeared at the time of the enactment of the Shipping Act, is reproduced in the Appendix (p. 4a, *infra*).

** Pertinent provisions of the Interstate Commerce Act, as they read at the time of the decision in *Kennedy,* are reproduced in the Appendix (pp. 4a-6a, *infra*). It should be noted, however, that section 5b (49 U.S.C., section 5b) was not involved.

terned [*McManus* v. *Civil Aeronautics Board*, 286 F.2d 414, 419 (2d Cir. 1961); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290, 291 (1966)], the Federal Aviation Act immunizes anticompetitive arrangements from the antitrust laws provided they first are filed and approved. The Civil Aeronautics Board has assumed without question that agreements which affect labor-management relations are no different from other types of collective action and must be filed and approved like any other. *Airlines Negotiating Conference Agreements*, 8 C.A.B. 354 (1947); *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168 (1959). The Second Circuit noted that the result reached by the Board "was apparently dictated by statutory language considerably broader than that of the antipooling provision of section 5(1) of the Interstate Commerce Act." 319 F.2d at 374n.11.

Furthermore, nothing in *Kennedy* supports the elaborate interrelated requirements the Commission now reads into section 15. *Kennedy* would exclude only agreements, like the one there under consideration, which did not effect "an unnatural and anticompetitive regulation of the pricing, supply, or distribution of goods or services." 319 F.2d at 373. *Kennedy's* strike insurance plan* placed no restraint "upon commercial competition in the marketing and pricing of goods and services." 319 F.2d 372-373. But since PMA's agreement clearly places such a restraint, it would still be covered.

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* Each railroad subscribed to an insurance program under which it paid a premium equal to its daily fixed costs for benefits of the same amount in the event of a strike. 319 F.2d at 366. As benefits were paid out, the fund was supplemented by further deposits by the non-struck roads. Neither the payments made by the railroads for the insurance nor the moneys received affected their competitive position. Unlike the payments to the Fund here involved, those in *Kennedy* were not allocable to any specific class of business. They were general overhead expenses which could be allocated as the railroad pleased. As for strike benefits, they were received only when the railroad had been temporarily eliminated from the market, so clearly they could not affect its competitive position.

In sum, none of the conventional guides to statutory construction justify reading the plain language of section 15 as meaning anything different from what it says: that all agreements among covered persons providing for a cooperative working arrangement, or otherwise described in the statute, are to undergo governmental scrutiny.

F

The court below should not have deferred to an erroneous administrative construction predicated on conventional judicial grounds.

In accepting "albeit with some hesitation" the agency's construction of the law in "deference to the expertise of the Commission" (R. 792), the court below confused the responsibility of the executive and the judiciary. The Commission's opinion reflects the fact that it resolved the issues in this case in two steps; first, determining what it believed to be the controlling rule of law and second, applying it to the facts before it. Without distinguishing between the two, the court treated the result reached as insulated from critical examination under the "substantial evidence" rule, taking as its touchstone *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607 (1966).

But the standards appropriate for reviewing the fashioning of discretionary relief by a regulatory agency are not proper guides where the issue is one of statutory construction peculiarly within the judicial competence and which the agency decided by application of the standards employed by the courts rather than in reliance on considerations within its special province. *Cf. Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270 (1960). The Administrative Procedure Act preserves the power of the courts to reject agency action "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights" and to "decide all relevant questions of law [and] interpret constitutional and statutory provisions." 5 U.S.C., section 706.

All that the Commission invoked were traditional tests of a purely legal nature. The courts are far better equipped by training and experience than the agency to give these matters their proper value. Only such weight should be given the Commission's construction as is appropriate having regard to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Federal Maritime Board* v. *Isbrandtsen Co., supra,* 356 U.S. 481, 499-500 (1958); *National Labor Relations Board* v. *Brown,* 380 U.S. 278, 290-292 (1965); *Federal Trade Comm'n* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 385 (1965); *Milk Transp. Inc.* v. *Interstate Commerce Comm'n,* 190 F. Supp. 350, 354-355 (D. Minn. 1960), *aff'd,* 368 U.S. 5 (1961).

So unpersuasive is the Commission's construction that it should have been rejected under any test. It is not a tenable interpretation since, in addition to all else, it demolishes the regulatory scheme and substitutes anarchy. Any projection will show these to be its results.

G

To leave the antitrust laws to cope with PMA's cooperative working arrangement destroys effective control of anticompetitive arrangements in the shipping industry.

"There are in theory two methods of overcoming the disadvantages of monopoly: competition and regulation. In this Nation economic theory and legislative policy have long coincided. Our laws forbid monopolies and in those special cases, like utilities, where elements of monopoly are unavoidable, they provide for public regulation."* Be-

* Subcommittee on Federal Procurement and Regulation of the Joint Economic Committee of Congress, 89th Cong., 2d Sess., "Discriminatory Ocean Freight Rates and the Balance of Payments," 16 (Committee Print 1966).

cause absolute freedom of competition was thought impracticable in ocean shipping, governmental regulation was substituted for the protection normally provided by free competition. S. Rep. No. 1, 89th Cong., 1st Sess., 21 (1965).

The legislative scheme requires that the scope of the Shipping Act be, at least, coextensive with that of the antitrust laws. Indeed, one would expect that of the former to be even broader because of the differences between regulation and prohibition. And, in fact, as noted earlier (p. 24, *supra*), the language of section 15 is more sweeping than the Sherman Act or any other antitrust law.

But as the Shipping Act is now interpreted by the Commission, the situation is reversed. Left outside section 15 is conduct long condemned by the antitrust laws. This emerges clearly in the opinion of the court below. Taking cognizance of petitioner's claim that what is here involved is a "combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter," the court suggests that petitioner's remedy lies in the antitrust laws (R. 801 n.13).

Acceptance of this view would leave some types of collective action under section 15 immune from attack under the antitrust laws if filed and approved [*cf. Carnation Co.* v. *Pacific Westbound Conf., supra,* 383 U.S. 213 (1966)], while similar conduct by the same persons and with the same effects would be outside the maritime statute and susceptible to challenge only under the Sherman Act. To determine in what category particular conduct falls would necessitate in every case an exhaustive administrative proceeding since no court would act on an antitrust complaint unless the Commission had decided the threshold jurisdictional question. Aggravating the situation would be the fact that the shipping lines, unlike ordinary businesses, can engage in

discussion and planning together in their section 15 bailiwick unhampered by the antitrust laws. Indubitably, they would be able to shape their conduct to come under one statute or the other as best suited the exigencies of the moment. For example, in this case, if the Commission's view were correct, inclusion in PMA's plan of an explicit provision to pass on the assessment would have brought the entire scheme under section 15; its exclusion would throw the matter under the antitrust laws.

As the Commission reads the statute, the public will be able to count on neither regulation nor prohibition to curb monopolies within the shipping industry. If this is not to occur and if the statutory scheme is to be effectuated, the Shipping Act must be read as being, at the very least, coextensive with the Sherman Act. Preferably, it should be read as written and as meaning what its plain language says.

No burden to the industry need be feared from reading the statute as written. At an early date the Commission ruled that purely "routine operations" need not be submitted for approval under section 15. *Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). Congress has acquiesced. H. R. Rep. No. 1419, 87th Cong., 2d Sess., 335 (1962).

More recently the Shipping Act has been amended to permit "any class of agreements * * * or any specified activity" to be exempted from the requirements of the Shipping Act where "such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory or be detrimental to commerce." 46 U.S.C., section 833a (Supp. II).

Nor should concern be felt that recognizing PMA's arrangement to be an unfiled section 15 agreement may redound to the detriment of labor on the Pacific coast which in good faith has carried out its part of the underlying mechanization agreement. The agreement between PMA

and the ILWU is in no way affected by the legality or illegality of the method whereby PMA, acting independently, has raised the money to meet its obligations. What PMA will have to do is to bring its fund-raising activities into line with the requirements of the Shipping Act. With the cooperation of its membership, it should have no difficulty in doing so. But any difficulties it has created for itself should not serve as a reason for giving its collective action permanent immunity from the requirements of the law.

The difficulties and obscurities which for years have troubled the enforcement of the antitrust laws are now being introduced into the Shipping Act. In place of the *per se* rules laid down by Congress the Commission is mandating an elaborate evidentiary inquiry. Neither the shippers the Act was designed to protect nor the carriers it was to control can now be certain which agreements are subject to governmental surveillance and must be filed and approved before being put into execution, and which agreements need not, but are also ineligible for immunity from the antitrust laws.

We are not concerned here with a statute, like the antitrust laws, which condemns as illegal the agreements it covers, but with regulatory legislation whose purpose is not to prohibit the described arrangements but simply to ensure their submission to governmental scrutiny. Thus no harm can be caused by a liberal interpretation while great damage to the legislative intent can be done by an unsympathetic construction.

> "Statutes may be emasculated as readily and as much by unauthorized restricted reading as by one unduly expansive. And the wisdom [of particular statutory provisions] * * * is the concern of Congress, not of this Court. We leave the statute as Congress enacted it." *United States* v. *American Union Transp., supra,* 327 U.S. 437, 457 (1946).

II

The Commission erred in requiring under section 15 contractual commitments rather than a mere understanding among PMA's members.

Even under the Commission's reading of section 15 as limited to agreements affecting competition for the business of shippers, PMA's assessment program would have been covered had not the Commission compounded its original error by the narrow view it took of what constitutes an "agreement" for the purposes of section 15.

Not all competitive restraints imposed by collective action are the product of formal legally binding contracts. To make certain that the absence of explicit contractual commitments did not permit anticompetitive arrangements to escape administrative scrutiny, the drafters of the Shipping Act explicitly defined the type of arrangement which had to be approved before being placed in execution as embracing "understandings, conferences, and other arrangements." The breadth of the definition was designed to reach "gentlemen's understandings" as well as more explicit contractual arrangements. Alexander Report, 415. Thus, to come within the Shipping Act, collective action need not meet the requirements of a common-law contract. *Unapproved Section 15 Agreements—South African Trade,* 7 F.M.C. 159, 186-191 (1962); *Unapproved Section 15 Agreements—Spanish/Portuguese Trade,* 8 F.M.C. 596, 607-608 (1965).

What the undisputed contemporaneous documentary evidence shows clearly and consistently is a collective understanding among everyone concerned, MTC (Ex. 9, R. 486, Ex. 32, R. 519), other PMA on-shore operators (R. 240-242, 626-627, 656) and PMA's staff (Ex. 11, R. 492-493, Ex. 21, R. 504, Ex. 55, R. 588-593), that it was part and parcel of PMA's program "to pass on all or a portion of its assessment to the carriers and shippers served by the terminal operators." Thus, even if the conditions

which the Commission states must be met for a section 15 agreement to exist were sound, they are all satisfied here. That the Commission concluded otherwise is due to the fact that it restricted itself to searching the record for contractual commitments rather than inquiring as to the nature of the "understanding" among PMA members.

No one is in a better position than MTC to know just what that "understanding" was. At every one of the meetings of PMA's members and directors when the assessments were formulated and approved, MTC was represented either by its President, C. R. Redlich, or its Vice President, Ellet G. Horsman (R. 369, 374, 378). It is significant, therefore, that when PMA sued MTC for the unpaid assessments on petitioner's cargo, MTC pleaded in defense "that the assessments for the benefit of the Mechanization Fund are made *on the understanding* that the employer can lawfully collect the amount of the assessment from the carrier or cargo owner for whom the employer performs the stevedore and terminal services" (emphasis added) (R. 26).

So far as PMA carrier members were concerned, the on-shore operator was simply a conduit, introduced into the arrangement as a formality for tax purposes only (pp. 13-14, *supra*). These members were directed to pay the PMA assessment to their stevedoring contractors even before the latter paid PMA (Ex. 55, R. 590). Of course, similar instructions could not be given non-PMA members like petitioner, but, nevertheless, it was as integral a part of PMA's arrangement that they would bear the cost of the assessments as that the carriers would. Any other course would have given chartered cargo preferential treatment over carrier-borne cargo. This scarcely would have recommended itself to an organization dominated by carriers.

Both the Examiner (R. 638-639, 651) and the Commission (R. 671, 675-676) have mistakenly viewed MTC's offer to absorb the mechanization assessment if placed

on a weight basis, in which event it would have amounted to about twenty-five cents, as showing that it was not part of the PMA program that the assessments be passed on. But there is in fact no inconsistency. The PMA assessments were not intended to interfere in any way with the customary negotiations by which a commodity rate is normally established between a stevedoring contractor and his customers, carrier or shipper. That in negotiating a new rate the PMA assessment would necessarily be included did not mean that the new rate would be the old rate plus the PMA assessment. The Mech Fund agreement was expected to reduce stevedoring costs, not increase them.

Thus one PMA carrier, as soon as the Mech Fund arrangement went into effect, "put [its] San Francisco stevedore on a cost-plus basis, as an emergency measure, to assure that any savings that came from his change of operations would accrue to us immediately" (R. 126). In short, even though the carrier paid the PMA assessment in its entirety, a new rate was established in the expectation that even with the "pass-on" of the PMA assessment the total would be less than before.

Since assessment of automobiles on a weight basis would have been roughly in line with the burden on other cargo, it is understandable that MTC were of the opinion that it would be able to absorb them, that is, continue to do business on the basis of the existing commodity rate relying on the savings from the underlying PMA-ILWU agreement to balance the PMA assessment.

But when PMA opted for the measurement ton basis, an absolute increase in the commodity rate became inescapable. The $2.35 assessment per vehicle could no longer be lumped with the other items entering into the commodity rate, but very visibly had to be "passed on," with MTC exposed as a "collection agency."

Like any "collection agency," MTC have never been required by PMA to remit any moneys which they could

not collect. MTC have yet to pay a single penny on petitioner's cargo (R. 18-27). In parallel fashion, the onshore operators discharging Army cargo paid no assessments on such cargo as long as reimbursement was not forthcoming (Ex. 21, R. 503-506, Ex. 2H, R. 357, Ex. 2F, R. 354, Ex. 31, R. 518).

Again, like a "collection agency," MTC have sought and received instructions from their principal regarding how petitioner is to be compelled to foot the bill. Significantly, as Commissioner Patterson points out, "the funds were not considered to be due from Marine Terminals" (R. 706).

It is a fair inference that the litigation finally brought by PMA against MTC is part of a common plan. When petitioner, impleaded by MTC, secured a stay, PMA's Board of Directors decided "that the Chairman will convene a meeting with PMA Counsel and stevedore Counsel to determine a course of action under the present situation" (R. 348). To Commissioner Patterson, the conduct of the litigation "underlines the point that respondents and PMA understood they were working together in a non-adversary arrangement to collect money due from 'outsiders' rather than from members" (R. 707).

The facts speak for themselves. The actions of PMA's members show that, in practice, "pass-on" and "payment" under the PMA plan are inseparable. Where pass-on has not been possible, nothing has been paid. Accordingly, had the Commission looked to what the "understanding" was between the parties, it would have found here just such an arrangement as it deemed critical, that is, one to pass-on to VW and other customers the PMA assessments.

Where anti-competitive arrangements are involved:

> "[J]udicial inquiry is not to stop with a search of the record for evidence of purely contractual

> arrangements. The Sherman Act forbids combinations of traders to suppress competition. * * * [W]hether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

See also *United States* v. *General Motors Corp.*, 384 U.S. 127, 142-143 (1966); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 612 (1914).

III

PMA's assessments violate section 16. The sole reason the Commission gave for dismissing petitioner's complaint under this section has since been repudiated by the agency.

For the reasons pointed out by the Solicitor General, the issues raised under sections 16 and 17 are ripe for adjudication, whatever disposition the Court makes of section 15 (Brief for the United States, 34).

Section 16 First in the most comprehensive and sweeping language forbids discrimination between shippers or cargo. It makes it unlawful for any common carrier by water or other person subject to the Act "either alone or in conjunction with any other person, directly or indirectly * * * to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

PMA's assessments are covered by this language. For the same benefits all cargo receives from the Mech Fund, that is, the opportunity to effect labor savings, MTC, in conjunction with the other members of PMA, are charging automobiles from ten to one hundred times as much. Such a differential in the rate "charged for identical services and facilities" is "prima facie discriminatory." *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 303 (1937).

But petitioner's contention that section 16 had been violated was brushed aside by the Commission on the ground that to sustain its position VW is required to show that cargo in competition with its Volkswagen automobiles has been preferred (R. 675-676).*

Because the court below thought PMA's allocation reasonable, it found it unnecessary "to consider whether and under what circumstances a rate practice that is purely 'random' and *hence* inherently discriminatory may be challenged under Section 16 in the absence of a showing that competitive cargo has been preferred" (R. 801).

That question must be reached, however, if this Court agrees that the ruling made below regarding section 17 cannot stand. Moreover, the specific prohibition against discrimination in section 16 may be applicable even if, for purposes of section 17, the practices under attack are "reasonable." Obviously, the two provisions were not considered coextensive by the drafters of the Act or one would have been omitted.

If the section 16 issue is reached, the Commission's present position would appear to require that it admit error in its disposition of this phase of the case. A few short months after it handed down its decision here, "the

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* The Commission states that petitioner "itself admits that all of the relevant case law requires a showing that competitive cargo has been preferred to sustain an allegation of a violation of section 16" (R. 676). What we said in our brief to the Commission (p. 66) was in fact:

> "By administrative interpretation this broad prohibition has been narrowed as barring only differences between shippers of cargo in the same classification. * * *
>
> VW respectfully submits that there is no warrant in the legislative history of the statute for the narrow interpretation which has been placed upon its language. This interpretation we believe substantially defeats the legislative intent. All the reasons that establish a violation of section 17 by MTC show that section 16 has also been breached."

Commission comprehensively analysed the 'standing' problem with respect to Section 16 litigation and overruled the older cases which required a showing of competitive disadvantage as a condition precedent to litigation of a Section 16 claim." *City of Los Angeles* v. *Federal Maritime Comm'n*, D.C. Cir., No. 20,025, n.8 (Sept. 15, 1967). It firmly rejected the contention that "there must be a competitive relationship between the shipper or cargo allegedly preferred and the shipper or cargo allegedly prejudiced before a violation of section 16 First can be established." *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 544 (1966).

> "[W]hatever the justification for requiring a competitive relationship when determining the existence of preference or prejudice in ocean freight rates, such a requirement cannot be justified when determining whether preference or prejudice results from free time or free storage practices; for free time, like the forwarder's procurement of marine insurance, bears no relationship to the character of the cargo—it is extended to cargo on equal terms without regard to size, shape or any other characteristic inherent in the particular cargo involved. The same holds true for storage made available at a flat charge per square foot regardless of what commodity is to be stored. In such cases unequal treatment has no place in a regulated industry. The equality required in situations of this kind is absolute and is not conditioned on such things as competition, proximate cause and the like. To the extent that the other cases may read as requiring the establishment of a competitive relationship in the situation here involved, they are overruled." *Id.* at 547.

In rejecting the competitive cargo requirement, the Commission was not breaking new ground. At no time was a showing that competitive cargo was preferred the universal requirement the Commission assumes. In fact, regulatory action under the Shipping Act has been successfully defended as necessary to prevent discriminatory practices outlawed

by section 16 without ever exploring what the impact of such practices was upon competition. *California* v. *United States, supra,* 320 U.S. 577, 581-582 (1944). At the urging of the Commission, the Court of Appeals for the Second Circuit has refused to read section 16 as requiring in all circumstances a "competitive relationship between two shippers who are charged different prices." *New York Foreign Freight Forwarders & Brokers Ass'n* v. *Federal Maritime Comm'n,* 337 F.2d 289, 299 (2d Cir. 1964), *cert. denied,* 380 U.S. 910 (1965). The court agreed with the position taken there by the Commission that a practice of "charging shippers disguised markups of widely varying amounts on substantially identical services, without justification [was] * * * prima facie discriminatory in a regulated industry." 337 F.2d at 299.

Although it would thus seem that the Commission has now clearly repudiated the crippling doctrine applied to the case at bar, the Solicitor General suggests that the agency's position in this case "is supported by the interpretation that has been placed on Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), *United States* v. *Great Northern Ry. Co.,* 301 I.C.C. 21, 26-27, on which Section 16 of the Shipping Act is modeled." Brief for the United States, 35.

It is true that the Interstate Commerce Commission has employed language in some decisions suggesting that, absent impairment of competition, discrimination or preference do not violate the statute. But we have been unable to find that any court has ever reviewed this administrative interpretation. Nor, despite the breadth of the language sometimes found in its opinions, has the Interstate Commerce Commission made the existence of such competition indispensable. *Union Tanning Co.* v. *Southern Ry. Co.,* 25 I.C.C. 112 (1912); *Joseph A. Goddard Realty Co.* v. *New York, Chicago & St. L. R.R. Co.,* 229 I.C.C. 497, 501 (1938).

What seems to have happened is that a doctrine originally conceived as a liberalizing view, that is, that injury

to competition provides basis enough for invoking the protection of this section,* has become distorted over the years into an absolute requirement.

Should the Interstate Commerce Commission's doctrine itself ever come before the courts for review, it would, we believe, be condemned as irreconcilable with the language and purposes of the Interstate Commerce Act. As this Court has repeatedly observed, the Interstate Commerce Act "uses language of the broadest type to bar discriminations of all kinds." *Boynton* v. *Virginia,* 364 U.S. 454, 457 (1960).

Consistently with the broad purpose intended to be served by that act, section 3(1) has been invoked successfully to strike down preference or discrimination in circumstances where no injury to competition was conceivable. Thus, it was utilized to attack the free transportation of the private cars and office cars of other railroads. *Louisville & Nashville R. Co.* v. *United States,* 282 U.S. 740 (1931). Again, it was this section which ended discrimination in transportation services among interstate passengers. *E.g., Boynton* v. *Virginia, supra,* 364 U.S. 454 (1960). In the great majority of the cases in which it has been successfully employed, it would have been unavailable if read as requiring proof of injury to competition.

In a most persuasive opinion recommending that the competitive cargo requirement be repudiated for all purposes, Examiner Theeman points out how much it is at odds with the legislative history and objectives of the Shipping Act. *Investigation of Household Goods, North Atlantic Mediterranean Freight Conference,* F.M.C. Docket

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* *H & H Bates, Jr.* v. *Pennsylvania R.R. Co.,* 3 I.C.C. 435, 446-448 (1890), vacated on rehearing upon new evidence, 4 I.C.C. 281 (1890); *John P. Squire & Co.* v. *Michigan Cent. R.R. Co.,* 4 I.C.C. 611, 622-628 (1891).

No. 66-49 (Initial Decision, June 30, 1967). He was prompted to do so by the fear that the doctrine would impede disapproval of the enormous difference in the rates charged two separate government agencies for the same services, since the agencies do not, of course, stand in a competitive relationship with one another.

But whatever vitality the doctrine may still have in connection with ocean freight rates, the Commission itself, as earlier pointed out, has held it to have no place where the service being rendered "bears no relationship to the character of the cargo" and is "extended to cargo on equal terms without regard to size, shape or any other characteristic inherent in a particular cargo involved." *Investigation of Free Time Practices—Port of San Diego, supra,* 9 F.M.C. 525, 547 (1966). The opportunity to effect labor savings is exactly of this character. For the same benefit which is being extended to all cargo, grossly disproportionate charges are being laid on automobiles, both relatively and absolutely.

The only conclusion possible on this record is that reached by Commissioner Patterson: "that there has been preference and advantage to traffic other than Complainant's property and disadvantage and prejudice to Complainant's property" (R. 716).

IV

PMA's assessments violate section 17 of the Shipping Act.

A

That a disfavored shipper receives "substantial benefits" does not make discriminatory treatment of him "just and reasonable."

Section 17 requires every person covered by the Shipping Act to "establish, observe and enforce just and reasonable regulations and practices." Parallel language

in the Interstate Commerce Act had been described as reaching "practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper and oppressed the small one." *United States* v. *Pennsylvania R.R. Co.*, 242 U.S. 208, 229 (1916).

Charges for stevedoring and terminal services of the character MTC render petitioner have repeatedly been examined under this section to make certain that shippers did not pay for services rendered carriers, or vice versa, that services and charges were related to one another, and that differences in transportation conditions justify differences in the rates charged. *California* v. *United States, supra*, 320 U.S. 577, 586 (1944); *City of Los Angeles* v. *Federal Maritime Comm'n, supra*, D.C. Cir., No. 20,025 (Sept. 15, 1967); *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41, 45 (1922); *American Tobacco Co.* v. *Compagnie Generale Transatlantique*, 1 U.S.S.B. 53, 56 (1923), *aff'd*, 31 F.2d 663 (2d Cir. 1929), *cert. denied*, 280 U.S. 555 (1929); *Hellenic Lines, Ltd.—Violation of Sections 16 (First) and 17*, 7 F.M.C. 673 (1964); *Phillipine Merchants Steamship Co., Inc.* v. *Cargill, Inc.*, *supra*, 9 F.M.C. 155 (1965); *Investigation of Free Time Practices—Port of San Diego, supra*, 9 F.M.C. 525, 542 (1966); *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 (1966). Indeed, accounting practices have even been reviewed to make certain that charges and benefits are related. *Terminal Rate Structure—Pacific Northwest Ports*, 5 F.M.B. 53 (1956).

That petitioner's cargo is the subject of special and discriminatory treatment is established by the facts found by the Commission. The first is that automobiles pay substantially more than other cargo. On this the Commission found that general cargo, including automobiles, carries a higher assessment than bulk cargo or coastwise lumber

(R. 669-670).* Another finding is that automobiles are made the subject of special treatment: "although other cargo is assessed as manifested, automobiles are always assessed on a measurement basis" (R. 677). The third relevant fact is that automobiles receive no greater benefits than any other cargo from the Mech Fund plan. The Commission found that "as there is little likelihood of mechanical improvement in the method of unloading automobiles, auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown" (R. 677).

But now the Commission declares, and the court below concurs, that section 17 does not mandate equality. It is enough that "substantial benefits" are present; that other persons, identically situated, are paying less for the same benefits is not unjust or unreasonable.

If some people can lawfully be charged more and other people less for the same services, what is prejudice? Or disadvantage? Or reasonableness? What does the statute proscribe, if anything? Only outright larceny, an exaction for which nothing is given in exchange, would seem to be banned.

The case cited by the Commission as supporting the inequitable doctrine which it now enunciates, *Evans Cooperage Co., Inc.*, v. *Board of Comm'rs of the Port of New Orleans*, 6 F.M.B. 415 (1961), in fact looks the other way.

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* In fact, the wholly uncontroverted evidence, on which the Commission failed to make any finding, establishes that, measured by the only available standards, *i.e.*, cost of labor and total cost of discharge, automobiles pay *ten times* as much, proportionately, as the next highest classification, *i.e.*, general cargo (*supra*, pp. 7-8). None of the conjectural possibilities referred to in a footnote by the court below affect this proof (R. 800-801 n.12). Significantly, PMA, despite its elaborate research staff and the extensive studies made by it in this area, was unable to produce any evidence that the burden on automobiles is not exactly as petitioner has always maintained—ten times as much as on other general cargo.

There, a uniform wharf tollage was sustained as to cargo not passing over the wharf because reasonably related benefits were received. Greater precision in equating benefits with burdens was waived by the Commission because "precise equivalence" was impossible. *Id.* at 419. This expressed preference for an exact correlation between benefits and burdens is the very opposite of a rule which would license whatever burden there is power to impose. Furthermore, the charge there was the same for all (*id.* at 416), whereas here what petitioner is complaining of is inequality in treatment to the point where its cargo has been made the subject of a special discriminatory rule.

Section 17 was placed in the statute to put an end to one of the specific types of abuse which investigation had revealed—unjust discrimination against individual shippers in connection with just such matters as terminal charges. Alexander Report, 292, 293, 410-411; 53 Cong. Rec. 8276 (1916). To require no more than that a shipper receive something in exchange for his money, without regard to how disproportionate the charge made is to what others are required to bear, is to render section 17 useless for the purpose for which it was designed.

Perhaps in recognition of this fact, the Commission suggested that it might reach a different result if malice were present.

> "An exception to the above principle might arise if it could be shown that the leviers of a charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than another" (R. 677).

Nothing in the language of the statute or its past interpretation [*California Stevedore & Ballast Co.* v. *Stockton Elevators, Inc.*, 8 F.M.C. 97, 103 (1964); *Hellenic Lines, Ltd.—Violation of Sections 16 (First) and 17, supra*, 7

F.M.C. 673, 675-676 (1964)] makes improper motivation an essential element of an "unjust or unreasonable practice." Undue preference or discrimination in land carriage is not precluded by the absence of "favoritism or malice." *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 523-524 (1924); *Interstate Commerce Comm'n* v. *Chicago Great Western Ry.*, 209 U.S. 108, 122-123 (1908). This is not to say that intent may not be material; only that it is not an essential element, as the Commission would make it. Yet, even under the Commission's mistaken view of section 17, PMA's program should have been condemned. The record leaves no doubt that the discriminatory treatment of petitioner's cargo was the product of deliberate design. What else lies behind the decision, repeatedly reaffirmed, to make automobiles pay on the basis of measurement rather than weight, taken with full awareness of the resulting injustice and inequity? PMA intended exactly what it accomplished, to transfer to automobiles the financial burden which liner cargo should have been carrying.

But the Commission never passed upon PMA's motivation. It did not determine why PMA levied its assessments as it did. The Commission took the position that only MTC's actions in passing on the assessments were to be tested under section 17. The Examiner did the same: "[W]e do not comment on the justness or unjustness, reasonability or unreasonability of the actions of PMA or the aims and purposes of that agreement" (R. 653). That petitioner was challenging under section 17 not only MTC's pass-on of the assessments but also their initial imposition (R. 609, 664) was ignored.

Looking solely to what motivated MTC, the Commission had no difficulty in acquitting these companies of any improper design. Obviously, if the PMA assessment itself is insulated from review, MTC's action in passing this unavoidable cost element on to VW is not unreasonable. In short, the Commission applied the wrong test to the wrong persons.

B

The court below in affirming the Commission's decision invaded the administrative area.

When the court below came to review the results reached by the Commission, it recognized, as the Commission had not, that at issue was the PMA assessment itself.

> "We reject at the outset of our discussion of Section 17 respondent's argument that the issue of the unreasonableness of the charge itself can be entirely ignored because petitioner is charging MTC and not PMA with the violation. The complaint, fairly read, charges all members of PMA—including MTC—with an unreasonable practice in the method of computing the assessment" (R. 795 n.8).

But since neither the Examiner nor the Commission had passed on the applicability of section 17 to "the method of computing the assessment," neither had considered whether it was consistent with the requirements of that section nor made findings or conclusions with regard thereto. So far as this issue was concerned, therefore, the case was not yet ripe for review. It should have been remanded to the Commission to give it an opportunity to consider this issue, to make its ruling and to state the reasons for its action. *National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-444 (1965); *Interstate Commerce Comm'n* v. *J. T. Transport Co.*, 368 U.S. 81, 93 (1961).

Such a course was dictated by the rule "that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Securities & Exchange Comm'n*

v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962).

In remanding the proceeding for further consideration, the court below could, of course, have indicated the principles by which the Commission should guide itself. What the court did instead was to examine the evidence itself and decide the issue which the Commission had avoided. Although the court does not spell out the legal principles it is applying, they clearly differ from those of the Commission.

First, the court makes it plain that it deems irrelevant what the agency considered of paramount importance. In clearing PMA's assessment of illegality, the court holds PMA's intent to be outside the case. It refused to consider as an issue before it petitioner's claim that it is being deliberately victimized by the common carriers dominating PMA (R. 801 n.13).

But at the same time, the court, in absolving of any violation of section 17 both PMA's system of assessment and the special treatment of automobiles, gives critical importance to the considerations which ostensibly led to the selection of the system of assessment employed. How then can the court exclude as an issue what the real reasons might have been?

In essence, the court finds PMA's system of assessment "not unreasonable" because other alternatives had been considered and rejected, revenue tonnage had previously been used for dues purposes and administrative simplicity was a cardinal consideration. The treatment of automobiles is cleared of unreasonableness on historical grounds. The court finds "substantial evidence" that PMA intended to allocate charges on the same tonnage basis as had been used for PMA's dues and it apparently concludes that this meant measurement tons so far as automobiles are concerned.

How the system operated in practice is virtually ignored. The disproportion between benefits and burdens with regard to automobiles found by the Commission is mini-

mized and brushed aside: "[A] generally reasonable rule for assessing benefits may be maintained though it produces some instances of burdens wholly disapproportionate to benefits" (R. 801).

The premises upon which the court's opinion rests are as destructive of section 17 as those applied by the Commission. Whether a shipper is the victim of an unjust and unreasonable practice should be determined by what is happening to him, not by what good reasons those victimizing him have for discriminating nor how long they have been doing so unchallenged. In the words of Mr. Justice Brandeis: "Self-interest of the carrier may not override the requirement of equality in rates." *United States* v. *Illinois Central R. Co., supra,* 263 U.S. 515, 524 (1924). "Commercial convenience cannot justify a practice which is otherwise unreasonable." *Investigation of Free Time Practices—Port of San Diego, supra,* 9 F.M.C. 525, 541 (1966).

But even under the standards employed by the court below the results it reaches are indefensible.

The question is not what PMA's reasons were for electing to raise the Mech Fund by means of a tonnage tax, but why, in tailoring that tax to the peculiarities of petitioner's chartered shipments, did PMA select from among the available alternatives the most burdensome and inequitable, a tax based upon measurement tonnage. It is not the general rule, the decision to assess upon the basis of manifested tonnage, but the special rule unique to automobiles, to assess upon the basis of measurement tonnage regardless of what the manifest showed, which is the source of the injustice being done petitioner. Therefore, if subjective considerations are to be deemed controlling, as the court below apparently believes, what is critical here is not why the general rule, but why the special rule, was adopted.

The explanation will not be found either in administrative convenience or in historical considerations. Administrative convenience would have been equally served by a tax on Volkswagen automobiles based on weight as by one using measurement, which would have equalized the burden as between automobiles and other general cargo. Furthermore, where it suited PMA to change its formula as in the case of coastwise lumber, administrative inconvenience posed no impediment.

Turning to past practices, there was scant historical precedent for the general rule, let alone the special one. Generally, the cost of a fringe employee benefit was distributed on the basis of man hours, not tonnage (Ex. 5A, p. 3, R. 468, 69-71). PMA's own membership dues were predicated on a combination of man hours and tonnage in a sixty-forty ratio (Ex. 5A, R. 473). And whatever PMA advised its members in 1958, unit and weight were being used, as well as measurement, in calculating these dues when the Mech Fund went into effect (pp. 8-9, *supra*). The letter sent PMA members after the Fund was voted, directing the recalculation of past membership dues using measurement rather than weight, appears to rewrite, rather than reflect, history (*ibid.*). But even if PMA's special rule for automobiles were laid down as early as 1958, this would scarcely prove reasonableness since in 1958, just as in 1961, the carriers dominating PMA had good reason for discriminating against petitioner. Discrimination gains no sanctity by repetition. Finally, history and how membership dues had been paid in the past no more inhibited PMA when it cared to act, as in the case of scrap metal (Ex. 35, R. 522), than did administrative inconvenience.

In short, PMA's discrimination was engaged in "without reference to an adequate determining principle or standard" and was, therefore, necessarily both unjust and unreasonable. *Isbrandtsen Co.* v. *United States,* 96 F. Supp. 883, 889 (S.D.N.Y. 1951), *aff'd sub nom., A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.,* 342 U.S. 950 (1952).

C

PMA's plan violates section 17 because no transportation conditions justify the discriminatory treatment of petitioner's cargo.

The error into which the court below fell was in not recognizing that the test of compliance with section 17 is an objective one. What the statute condemns is any difference in rates "not justified by the cost of the respective services, by their values, or by other transportation conditions." *Atlantic Refining Co.* v. *Ellerman & Bucknall S.S. Co.*, 1 U.S.S.B. 242, 249-250 (1932). If judged by the transportation standard a rate is discriminatory and inflicts undue prejudice, it comes within the ban of the statute though honestly motivated. *California Stevedore & Ballast Co.* v. *Stockton Elevators, Inc., supra,* 8 F.M.C. 97, 103 (1964). This is exactly the construction placed on the Interstate Commerce Act. *United States* v. *Illinois Central R. Co., supra,* 263 U.S. 515, 523-526 (1924).

The Mech Fund is a fixed sum paid for the privilege of effecting labor savings. Presumably, PMA considered the bargain a good one or it would not have made it, that is, it thought the savings the agreement would permit would outbalance its cost. Five million dollars a year represented approximately five percent of the total waterfront labor bill (p. 7, *supra*).

In short, PMA was willing to experience an immediate increase in labor costs of five percent in exchange for the benefits the Mech Fund would bring. To require petitioner to suffer an increase of over fifty percent in labor cost for the same benefits is inequitable on its face. The savings made possible by the Mech Fund are most unlikely at any foreseeable time in the future to reach, let alone exceed, $2.35 per car, the amount of the tax laid on each of petitioner's vehicles.

In the case of other commodities, such as bulk cargo or scrap metal, where the amount of direct labor used was already low, PMA on its own initiative reduced the amount of the assessment to one-fifth that on other cargo, in recognition of the fact that, by necessity, potential labor savings were relatively small (p. 11, *supra*). Nothing prevented a similar adjustment of burdens to benefits for automobiles. All that was required was that weight tonnage be substituted for measurement tonnage when a special rule was promulgated for automobiles.

Even before petitioner objected, PMA's Board of Directors apparently recognized automobiles to be a commodity, like scrap metal, which its "rough-and-ready" formula did not fit (Ex. 2N, p. 2, R. 370). In the case of both, labor costs were already low and there was comparatively little opportunity for further saving (compare R. 78 with Ex. 10, R. 488). Such considerations led to a reduction in the rates on bulk cargo and scrap metal (R. 77-78). If automobiles on the contrary have been made the subject of a particularly onerous special rule, despite petitioner's repeated and well-documented protests, it is because if automobiles pay more, other cargo pays less. By forcing automobiles to contribute more than their *pro rata* share to the five million dollar annual toll for the Fund, PMA's membership are subsidizing their own operations. If chartered cargo bears a disproportionately large share of the cost, liner cargo pays that much less.

Just such egregious manipulation of costs and benefits as is present here has been condemned as unjust and unreasonable. *Practices, Etc. of San Francisco Bay Area Terminals, supra*, 2 U.S.M.C. 588 (1941), *aff'd sub nom., State of California* v. *United States*, 46 F. Supp. 474 (N. D. Cal. 1942), *aff'd*, 320 U.S. 577 (1944); *Investigation of Certain Storage Practices, supra*, 6 F.M.B. 301, 315-316 (1961); *Storage Practices at Longview, Wash.*, 6 F.M.B. 178, 182-184 (1960); *California Stevedore & Ballast Co.* v.

Stockton Elevators, Inc., supra, 8 F.M.C. 97, 105 (1964). *Cf.*: *City of Los Angeles* v. *Federal Maritime Comm'n, supra,* D.C. Cir., No. 20,025 (Sept. 15, 1967).

PMA's assessments violate section 17 because they compel petitioner's cargo to carry a burden which properly belongs elsewhere.

CONCLUSION

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions." *N.L.R.B.* v. *Brown, supra,* 380 U.S. 278, 291-292 (1965).

For the foregoing reasons the judgment below should be reversed with directions to set aside the Commission's order.

Dated: September, 1967.

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